INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	12

CITATIONS

Cases:

American Textile Woolen Co. v. *Commissioner*, 23 B. T. A. 670, affirmed, 68 F. 2d 820, certiorari denied, 293 U. S. 558 — 3, 7, 8

Noel v. *Baskin*, 131 F. 2d 231 — 9

Royal Indemnity Co. v. *United States*, 120 F. 2d 136, certiorari denied, 315 U. S. 797 — 5, 7, 8

United States v. *John Barth Co.*, 279 U. S. 370 — 10

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057:

Sec. 240 (a) — 5, 8, 12

Sec. 240 (b) — 12

Sec. 250 (d) — 12

Revenue Act of 1924, c. 234, 43 Stat. 253:

Sec. 273 (1) — 8, 13

Sec. 274 (a) — 13

Sec. 274 (b) — 13

947034—51

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 581

ROYAL INDEMNITY COMPANY, A CORPORATION,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25–32) is reported at 92 F. Supp. 1003.

JURISDICTION

The judgment of the Court of Claims was entered October 2, 1950. (R. 32.) Petitioner's motion for new trial was denied on December 5, 1950. (R. 33.) The petition for a writ of certiorari was filed February 27, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether a tax assessed against a subsidiary corporation under the Revenue Act of 1918 was rendered void by the subsequent filing of a consolidated return by the parent corporation and the collection of a consolidated tax in the amount remaining after taxes previously assessed against the subsidiary had been deducted.

2. Whether the tax on the subsidiary corporation was barred by the statute of limitations.

STATUTES INVOLVED

These appear in the Appendix, *infra,* pp. 12–13.

STATEMENT

The facts found by the Court of Claims (R. 9–24) may be summarized as follows:

Louisville Woolen Mills (hereinafter called "Louisville"), all of whose stock was owned by American Textile Woolen Company (hereinafter called "American"), filed a separate income and excess profits tax return for 1918 showing a total tax liability of $129,364.93, which sum was duly assessed against Louisville. (R. 9–10.) After paying the first three installments of the tax, Louisville filed a claim for abatement of the balance of $32,341.24, on the ground that it was entitled to excess profits tax relief under the provisions of the Revenue Act of 1918. In connection with this claim, it furnished to the Collector of Internal Revenue a bond, with petitioner

herein as surety, agreeing to indemnify the Collector against any loss occasioned by the delay incident to consideration of the claim. (R. 10–11.) Thereafter the Commissioner of Internal Revenue advised American that its income and excess profits tax for 1918, together with that of Louisville and other affiliated corporations, should be determined and computed upon a consolidated basis under Section 240 of the Revenue Act of 1918. (R. 11–12.)

In 1921, American filed a consolidated return for 1918, showing a total consolidated tax liability of $351,034.14, but this amount was never formally assessed. American later paid $100,000 on account of the tax shown on this return, which amount was assessed against it and applied as a credit against the tax shown by the consolidated return. (R. 12.)

After final audit of the consolidated return, the Commissioner determined a total consolidated tax liability of $429,539.94, and a deficiency of $33,-929.20. This deficiency was determined by deducting from the consolidated tax liability the taxes previously assessed against the several affiliated corporations, including the total tax theretofore assessed against Louisville. (R. 16–17.) American appealed to the Board of Tax Appeals (now the Tax Court), which sustained the Commissioner's action in determining a consolidated tax deficiency against American. 23 B. T. A. 670. Upon settlement of this deficiency

pursuant to Rule 50 of the Board, credit was again given to American for the total amount of taxes which had previously been assessed against the several corporations (including Louisville) of the consolidated group. (R. 18–22.) American appealed from the deficiency determination to the Sixth Circuit Court of Appeals, which, on February 16, 1934, affirmed the Board's decision. 68 F. 2d 820. Certiorari was denied. 293 U. S. 558. The deficiency in consolidated tax determined against American was duly assessed against that company on August 27, 1932. The deficiency was compromised by agreement of May 10, 1938, between American and the Attorney General; and the compromise agreement contained a stipulation that it did not cover the subject matter of the bond given by petitioner as surety in connection with the tax assessed against Louisville. (R. 22–23.)

Louisville's claim for abatement of the tax assessed against it (and deducted in computing the consolidated tax deficiency) was formally rejected by the Commissioner after notice of rejection was sent Louisville by letter of August 23, 1932. After rejection of the claim, the Collector demanded from Louisville, and from the petitioner as surety, the unpaid portion of the tax. Payment was refused, and the United States instituted suit for collection against Louisville and petitioner, on August 12, 1936, in the United States District Court. Louisville was insolvent

at the time, and made no defense to the action. The District Court entered judgment in favor of the United States against petitioner, and its judgment was affirmed by the Sixth Circuit Court of Appeals. 120 F. 2d 136. Certiorari was denied on January 12, 1942. 315 U. S. 797. Petitioner paid the judgment on January 28, 1942. (R. 23–24.)

Petitioner then filed claim for refund of its payment. The claim was denied, and this suit for refund followed. (R. 24.) The Court of Claims unanimously held that petitioner was not entitled to the refund. (R. 25–32.)

ARGUMENT

This case presents neither an important question nor a conflict. It involves provisions of the 1918 Revenue Act which have long since been changed, turns on its unique facts, and was correctly decided by the court below.

1. Section 240 (a) of the Revenue Act of 1918, Appendix *infra,* p. 12, provides that if a tax is "assessed upon the basis of a consolidated return," the consolidated tax shall be assessed upon the respective affiliated corporations in the proportions agreed upon among them. The Court below held that a tax which had been assessed against a subsidiary corporation (Louisville) on the basis of a separate return of that corporation was not wiped out by the subsequent filing of a consolidated return by the parent (American), since the consolidated tax assessed against the

parent was determined by deducting the tax previously assessed against, and assumed by, the subsidiary. Having concluded that the subsidiary was not relieved of payment of the tax assessed against it and credited against the consolidated tax liability, the court below concomitantly held that petitioner, the surety on the bond given to secure payment of the tax, was not relieved. Its holding is clearly warranted by the undisputed facts.

2. Ignoring both these facts and the reasoning of the court below, petitioner contends (Pet. 7–10) that it has been denied a hearing on the "legality" of the tax assessed against Louisville. There is not the slightest justification for its complaint, or for the tone of indignation in which it is couched. As is plain from its opinion, the court below fully considered the legality of the assessment against Louisville in holding that petitioner as surety was obliged to pay the tax. After analyzing the facts showing that the tax assessed against Louisville had been credited against the consolidated tax liability, the court below observed (R. 31) that Louisville itself had no defense to payment, and that "The rights of plaintiff, as surety on the bond given to secure the payment of the tax, can be no greater than those of Louisville."

Far from having been deprived of a hearing on the legality of the tax in question, petitioner has been afforded two full hearings: first, in the

Government's action to collect the tax (*Royal Indemnity Co.* v. *United States,* 120 F. 2d 136 (C. A. 6), certiorari denied, 315 U. S. 797), and again in this suit to recover back the amount paid in satisfaction of the judgment obtained against it in that action. Indeed, petitioner is seeking by this refund suit to accomplish indirectly what it could not achieve directly in the Government's collection suit, for substantially the same arguments it here advances in support of its claim for refund were rejected on their merits as defenses to the Government's collection suit.[1] To grant the refund would nullify the judgment obtained in that suit.

3. The decision below is not in conflict with *American Textile Woolen Co.* v. *Commissioner,* 68 Fed. 2d 820 (C. A. 6), certiorari denied, 293 U. S. 558, as petitioner asserts (Pet. 10–11), but on the contrary is in harmony with it. That case involved the question of whether the deficiency in consolidated tax which was ultimately assessed against American was payable by American or the subsidiaries, and it was held payable by American on the basis of an agreement among the affiliated companies. The tax here involved, however, was never reflected in the deficiency in consolidated tax which was determined and assessed against American. It had already been assessed against Louisville, and it was deducted in com-

[1] See the opinion of the Sixth Circuit Court of Appeals in *Royal Indemnity Co.* v. *United States, supra* at pp. 138–139.

puting the consolidated tax liability assessed against American. As the court below observed (R. 31), "the Commissioner listed and credited against the total tax of the consolidated group the amounts of taxes already assessed against the several corporations," and, in its redetermination of the deficiency, the Tax Court "did likewise." By its own terms, Section 240 (a) of the 1918 Act applies only in a "case in which a tax is assessed upon the basis of a consolidated return," and the only amount which was here "assessed" on the basis of the consolidated return was the "deficiency" in consolidated tax arrived at by deducting the amounts theretofore assessed against Louisville and other members of the consolidated group. Moreover, as the court below pointed out (R. 31–32), the statute in effect at the time the deficiency in consolidated tax was determined (Section 273 of the Revenue Act of 1924, *infra,* p. 13) defined a "deficiency" as the difference between the amounts of tax previously "assessed" (or collected without assessment) and the tax determined to be due. The consolidated tax "deficiency" involved in the *American Textile* case was (R. 32) the amount determined "after allocating to the several corporations the taxes which had been assessed against them." Significantly, the same court which decided the *American Textile* case also later decided the *Royal Indemnity Co.* case, with which the decision below is in complete accord.

4. Nor is there any conflict with *Noel* v. *Baskin*, 131 F. 2d 231 (C. A. D. C.), as petitioner alleges (Pet. 11–13). The case bears no resemblance to this one, either on its facts or as to the issue presented. In the first place, the asserted conflict seems to rest in part, at least, upon petitioner's gratuitous assumption that the assessment against Louisville (admittedly timely made) was erased by the determination of a deficiency in consolidated tax, and its corollary assumption that any new assessment against Louisville is now barred by the statute of limitations. As the court below concluded (R. 32), the fact that a deficiency in consolidated tax was determined (after crediting the tax previously assessed against Louisville), and that American agreed to assume any liability for this deficiency, "did not * * * render void the assessments previously made or cause the collection of tax and interest, here involved, from the Louisville Woolen Mills or the plaintiff, to become barred under any statute of limitation."

In the second place, there is no question in this case as to whether the filing of a surety bond can constitute a waiver of the statute of limitations "for the indefinite future." Cf. Pet. 12. For the claim for abatement filed by petitioner's principal, Louisville, is shown to have been rejected by the Commissioner shortly after the Board of Tax Appeals had passed on the question of the consolidated tax deficiency, and sometime after August 23, 1932 (R. 23, Fdgs. 27 and 28).

It was only four years later, on August 12, 1936 (R. 24), that the Government brought suit on the bond. As this Court ruled in *United States* v. *John Barth Co.*, 279 U. S. 370, 375–376:

> * * * The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. * * * If there is any limitation applicable to a suit on the bond, * * * it has not yet become effective.
>
> * * * * *
>
> * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

5. There is no substance in petitioner's suggestion (Pet. 13–15) that the Commissioner has been inconsistent in demanding payment of both the tax assessed against Louisville and that assessed against American. The amount assessed against American was computed by deducting the amount assessed against Louisville. Peti-

tioner's contentions, if sustained, would produce the anomalous result that the tax in question is not collectible from anyone—neither from Louisville, against whom it was assessed and who became insolvent; nor from petitioner, who guaranteed its payment; nor from American, whose consolidated tax liability was determined by crediting the tax assessed against Louisville.

CONCLUSION

The decision below is correct, and there is no occasion for further review. The petition for a writ of certiorari should be denied.

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MAY, 1951.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> Sec. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: * * *
>
> In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. * * *
>
> (b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls * * * substantially all the stock of the other or others, * * *.
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> * * * * *
>
> Sec. 250.
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> * * * * *
>
> (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the

Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253:

Sec. 273. As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *

* * * * *

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals establishment by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. * * *

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U. S. GOVERNMENT PRINTING OFFICE: 1931